

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)	
)	
THE LAKIN LAW FIRM, P.C.)	FOIA Control No. 2004-074
)	
On Request for Inspection of Records)	

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 2004

Released: July 8, 2004

By the Commission:

1. The Commission has before it an application for review by The Lakin Law Firm, P.C. (Lakin) of the decision of the Wireline Competition Bureau (the Bureau) granting in part and denying in part its Freedom of Information Act (FOIA) request for records relating to contributions to the Universal Service Fund (USF) and the recovery of those contributions from residential customers. For the reasons discussed below, we deny the application for review.

I. BACKGROUND

2. On November 6, 2003, the Commission received a FOIA request from Lakin for records relating to the USF from 2000 to the present relating to the amounts of USF payments made by AT&T, Ameritech, Qwest, and Sprint, and how these carriers pass on USF contributions to their customers.¹ Pursuant to 47 C.F.R. § 0.461(d)(3), AT&T, Ameritech, Qwest and Sprint were notified of the FOIA request and invited to file comments.² The four carriers filed comments in opposition to the FOIA request.³ The carriers contended that the records sought were exempt from disclosure under FOIA

¹ Letter from Thomas G. Maag, Esq., The Lakin Law Firm, PC, to Managing Director (Oct. 28, 2003) (FOIA Request). Specifically, Lakin sought (1) correspondence to or from AT&T, Ameritech, Qwest, and Sprint relating to “if and how these companies may ‘pass through’ or otherwise charge their customers for the USF charge;” (2) all FCC rulings related to these companies “that determine or regulate or rule upon if and how these companies may ‘pass through’ or otherwise charge their customers for the USF charge;” (3) all FCC rulings advisories, or studies related to these companies “on the method for computing the companies USF obligation to the FCC;” (4) a list of actual USF payments to the FCC or the United States government from these companies; (5) any document showing how many residential customers paid directly to the FCC or the United States government; (6) any document showing how many residential customers paid USF related charges to these companies; and (7) “any document that shows or lists any FCC or other government enforcement action, civil action, administrative action, or the like” against these companies “related to billing their customers for USF charges.” *Id.* at 1-2. Lakin excluded from request any documents relating to individual customers. *Id.* at 1. Lakin subsequently clarified that it was not interested in publicly available reports or data underlying those reports.

² Section 0.461(d)(3) provides that when a FOIA request seeks records that are not routinely available for public inspection under 47 C.F.R. § 0.457(d) or that are the subject of requests for confidential treatment under 47 C.F.R. § 0.3459, the custodian of records will notify the submitter of those records that a FOIA request has been filed.

³ Letter from Amy L. Alvarez, District Manager, Federal Government Affairs, AT&T, to Marlene H. Dortch, Secretary (Dec. 5, 2003) (AT&T FOIA Response); letter from Michael B. Fingerhut, General Attorney, Sprint, to Diane Law Hsu (Dec. 8, 2003) (Sprint FOIA Response); letter from Jim Lamoureux, Senior Counsel, SBC Telecommunications, Inc., to Adrian Wright, Telecommunications Analysts, WCB (Dec. 8, 2003) (SBC FOIA (continued....))

Exemption 4, 5 U.S.C. § 552(b)(4), because they included confidential information concerning revenues, costs, and customers counts that, if disclosed, would cause the carriers substantial competitive harm.⁴ Lakin replied to the carriers' responses, arguing that the public interest requires disclosure of the records sought and that the carriers' allegations of competitive harm were "too vague" to sustain an Exemption 4 claim.⁵ It also argued that the records should be considered routinely available under the Commission's rules.⁶ The requester stated that a protective order could be used to limit further disclosure of the USF data if it was determined to be confidential.⁷

3. The Bureau granted in part and denied in part Lakin's FOIA request.⁸ The Bureau explained that the amounts paid by individual contributors to the USF are considered confidential under 47 C.F.R. § 54.711(b) and may not be disclosed unless directed by the Commission.⁹ It explained that disclosure of these amounts "could be used to determine growth and placement of competitive lines of business, and general market segmentation and position," with concomitant substantial competitive harm to the carriers.¹⁰ The Bureau identified the public sources of orders related to the pass through of universal service contributions to customers¹¹ and explained that as residential customers do not make direct contributions to the USF, there are no records responsive to that part of Lakin's request.¹² Finally, the Bureau explained that the remainder of Lakin's request sought records related to the Commission's audits of consumer charges imposed by AT&T and Sprint to recover their contributions to the USF. These records were the subject of a prior FOIA request, and, consistent with its action in that matter, the Bureau released 31 pages of records related to Commission communications with the carriers¹³ but withheld the remainder of the records.¹⁴

4. Lakin filed an application for review of the Bureau Decision.¹⁵ Lakin challenged the

(...continued from previous page)

Response) (regarding the request for records concerning Ameritech); and letter from Craig J. Brown, Senior Attorney, Qwest, to Managing Director (Dec. 8, 2003) (Qwest FOIA Response).

⁴ AT&T FOIA Response at 2; Sprint FOIA Response at 2; SBC FOIA Response at 2; Qwest FOIA Response at 1-2.

⁵ Letter from Thomas G. Maag, Esq., The Lakin Law Firm, PC, to Adrian Wright, Telecommunications Analyst, WCB (Dec. 19, 2003) at 7-13 (Lakin FOIA Reply).

⁶ Id. at 4-6 citing 47 C.F.R. §§ 0.453(a)(2)(ii)(L) and 0.453(a)(2)(ii)(M).

⁷ Id. at 13 citing Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, 13 FCC Rcd 24816, 24851 (1998) (Confidentiality Order) ("We also would expect to use the standard protective order where contributors to universal service support mechanisms justify non-disclosure of company-specific data pursuant to section 54.711(b) of the rules.").

⁸ Letter from Joseph T. Hall, Assistant Bureau Chief, Management, WCB, to Thomas G. Maag, Lakin Law Firm (Jan. 20, 2004) (Bureau Decision).

⁹ Id. at 4.

¹⁰ Id. at 4-5.

¹¹ Id. at 3-4 and nn. 9-12.

¹² Id. at 6.

¹³ Id. at 6 and Attachment A. The records listed in Attachment A were the records released in FOIA Control No. 2003-252, letter to J.E. Gallegos, Esq. and David Sandoval, Esq., Gallegos Law Firm, P.C., from Joseph T. Hall, Assistant Bureau Chief, Management, WCB (May 23, 2003) (Gallegos FOIA Decision).

¹⁴ Id. at 6-10 citing FOIA Exemptions 4 and 5, 5 U.S.C. §§ 552(b)(4) and (b)(5).

¹⁵ Letter from Thomas G. Maag, Esq., The Lakin Law Firm, PC, to Office of General Counsel (Feb. 4, 2004) (Application for Review). Pursuant to 47 C.F.R. § 0.461(k), the Office of General Counsel obtained from Lakin an extension of time for resolution of the application for review.

Bureau's conclusion that the USF contributions of the carriers should be withheld pursuant to FOIA Exemption 4.¹⁶ It again offered to enter into a protective order "so that this information is never released to any entity's competition,"¹⁷ and alternatively suggested that "the FCC could redact the name and identifying information of the entity that paid the specific USF amount, leaving only the amount actually paid."¹⁸ Lakin also challenged the adequacy of the search and the adequacy of the redaction of the audit-related records.¹⁹ The application for review was provided to the carriers.²⁰ The carriers all replied,²¹ and Lakin filed a response to the carriers' replies.²²

5. For the reasons discussed below, we deny the application for review.

II. DISCUSSION

Carrier-Specific USF Contributions

6. We conclude that the amount of USF contributions of four named carriers may be withheld pursuant to FOIA Exemption 4.²³ This FOIA exemption permits us to withhold commercial or financial information obtained from a person that is privileged or confidential.²⁴ As Qwest explains in its response to Lakin's application for review, the USF contributions of a carrier, when combined with other publicly available information, would enable competitors to estimate carrier revenues for specific product families, particular customers, and geographic areas, giving competitors a substantial competitive

¹⁶ Id. at unnumbered pages 1-4.

¹⁷ Id. at unnumbered page 4 (also noting that Lakin "is willing to . . . obtain court protective orders in litigation now pending with AT&T, Ameritech, Qwest, and Sprint").

¹⁸ Id.

¹⁹ Id. at unnumbered pages 4-5. Lakin requested "a sufficient showing by the FCC of the process used to determine redactability." Id. at unnumbered page 5.

²⁰ Letter from Laurence H. Schecker, Attorney-Advisor, Office of General Counsel, to Craig J. Brown, Esq., Qwest; Jim Lamoureux, Esq., SBC; Ms. Amy L. Alvarez, AT&T; and Michael B. Fingerhut, Esq., Sprint (Feb. 18, 2004). The application for review had not been served on these carriers by Lakin, nor had the carriers received the Lakin FOIA Reply or the Bureau Decision. These were also provided to the carriers.

²¹ Letter from Michael B. Fingerhut, General Attorney, Sprint, to Laurence H. Schecker (Feb. 23, 2004) (Sprint Reply); letter from Jim Lamoureux, Senior Counsel, to Laurence Schecker, Esq. (Feb. 25, 2004) (SBC Reply); letter from Craig J. Brown, Corporate Counsel, Sprint, to Laurence H. Schecker, Esq. (Feb. 27, 2004) (Sprint Reply); letter from Amy L. Alvarez, District Manager, Federal Government Affairs, AT&T, to Laurence Schecker, Esq. (Mar. 2, 2004).

²² Letter from Thomas G Maag, The Lakin Law Firm, PC, to Laurence H. Schecker, Esq. (Mar. 31, 2004) (Lakin Reply).

²³ 5 U.S.C. § 552(b)(4) ("trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential"). E.g., National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks).

²⁴ Lakin states that it does not seriously dispute, but does not concede, that the information has been obtained from a person and is commercial or financial. Application for Review at unnumbered page 3. There can be no doubt that the records were obtained from a person, see, e.g., Nadler v. FDIC, 92 F.3d 93, 95 (2d Cir. 1996) (term "person" includes "an individual, partnership, corporation, association, or public or private organization other than an agency," quoting 5 U.S.C. § 551(2) (Administrative Procedure Act definition of person)), and are commercial or financial information as those terms are ordinarily used. See, e.g., Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983), citing Washington Post Co. v. Department of Health and Human Services, 690 F.2d 252, 266 (D.C. Cir. 1982).

advantage.²⁵ Thus, as AT&T and SBC correctly note,²⁶ Lakin is incorrect when it argues that “one would have to be clairvoyant” to use USF data to the competitive disadvantage of the carriers.²⁷ We agree with the carriers that substantial competitive harm could result from the disclosure of the USF contribution figures.²⁸ For this reason, section 54.711(b) of our rules, 47 C.F.R. § 54.711(b), provides in pertinent part that “Contributors may make requests for Commission nondisclosure of company-specific revenue information under § 0.459 of this chapter by so indicating on the Telecommunications Reporting Worksheet at the time that the subject data are submitted.”²⁹ Further, the Bureau has consistently refused to release company-specific USF contribution data.³⁰

7. The requester proffers several arguments in favor of disclosure of the USF contribution figures, but to no avail. It suggests that because Lakin, a law firm, is not a competitor of the carriers, disclosure to it would not result in competitive harm.³¹ However, as Qwest properly notes, the issue here is whether disclosure to the general public would result in competitive harm.³² As the Supreme Court recently observed in National Archives and Records Admin. v. Favish, 124 S. Ct. 1570, 1580 (2004), “[i]t must be remembered that once there is disclosure, the information belongs to the general public.” For similar reasons, Lakin’s offer to accept the USF data under a protective order issued by the Commission³³ is not possible under the FOIA. “There is no mechanism under FOIA for a protective order allowing only the requester to see whether the information bears out his theory, or for proscribing its general dissemination.” *Id.* Lakin points to the Confidentiality Order, 13 FCC Rcd at 24851, where we stated that a protective order could be used “where contributors to universal service support mechanisms justify non-disclosure of company-specific data pursuant to section 54.711(b) of the rules.” That reference, however, concerned the possible discretionary release of USF contribution information in the context of Commission proceedings. Indeed, section 54.711(b) specifically states that data obtained from contributors is only to be used “for purposes of administering the universal service support programs.”³⁴ Finally, Lakin states that it would accept a listing of the USF contributions for the four carriers redacting the carrier name and identifying information.³⁵ However, there is no satisfactory way of doing this

²⁵ Qwest Reply at 2. AT&T and SBC attribute similar adverse competitive impacts to the release of the USF contributions. AT&T Reply at 3; SBC Reply at 3.

²⁶ AT&T Reply at 3; SBC Reply at 3.

²⁷ Application for Review at unnumbered page 3-4.

²⁸ See National Parks, *supra*.

²⁹ Division Announces Release of Revised Universal Service Worksheet, FCC Form 457, 13 FCC Rcd 4338, 4339 (AAD/CCB 1998) (Worksheet PN); see also Changes to the Board of Directors of the National Exchange Carrier Association, Inc., 13 FCC Rcd 22908, 22914 (1998) (Second R&O); See also 1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated With Administration Of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, And Universal Service Support Mechanisms, Report and Order, CC Docket No. 98-171, FCC 99-175 (July 14, 1999) at 24. A submitter could alternatively file a request for confidential treatment under 47 C.F.R. § 0.459.

³⁰ See, e.g., FOIA Control No. 2002-268 letter to Fred B. Campbell, Harris Wiltshire & Grannis from Joseph T. Hall (July 8, 2002); FOIA Control No. 2002-351 letter to Roy Thompson, Black Radio Network from Joseph T. Hall (Aug. 19, 2002).

³¹ Application for Review at unnumbered page 4.

³² Qwest Reply at 2.

³³ Application for Review at unnumbered page 4; see also Lakin FOIA Reply at 13.

³⁴ 47 C.F.R. § 54.711(b).

³⁵ Application for Review at unnumbered page 4; Lakin Reply at unnumbered page 2.

without revealing the identity of at least one of the carriers, and possibly all of them.³⁶

8. For these reasons, we agree with the Bureau that the USF contributions of the four carriers are properly withheld under FOIA Exemption 4.

Segregability of the Records

9. Lakin also argues that the Bureau erred in failing to release segregable portions of the records responsive to parts 1, 3, 6 and 7 of its FOIA request.³⁷ The Bureau concluded that “[n]o meaningful non-exempt information could be segregated.”³⁸ The records responsive to these parts of Lakin’s request related to previously-conducted audits of consumer charges imposed by AT&T and Sprint to recover their contributions to the USF. As the Bureau explained, these records were exempt from disclosure under FOIA Exemptions 4 and 5.³⁹ Lakin does not challenge these conclusions, and indeed states that it does not seek Exemption 5 material.⁴⁰ Rather, it seeks any factual information in the records.⁴¹

10. The Commission has a longstanding policy, recognized by the courts, of not releasing any audit-derived materials.⁴² Summary audit data may be released in limited circumstances.⁴³ Our review of the records withheld from Lakin reveals that much consists of raw audit data submitted by AT&T and Sprint, and thus was properly withheld by the Bureau under FOIA Exemption 4.

11. The Bureau did not simply rely on our policies concerning commercially sensitive audit data. It also relied on FOIA Exemption 5 to withhold materials prepared by agency staff relating to the audits. As noted above, Lakin only seeks the factual parts of those records. The FOIA requires that “any reasonably segregable portion of a record” must be released after application of appropriate FOIA exemptions.⁴⁴ Because the statute only requires “reasonable” segregation and release of nonexempt materials, the courts have permitted agencies to withhold the entire record where nonexempt material is so “inextricably intertwined” that disclosure would “leave only essentially meaningless words and phrases.”⁴⁵ Agencies may also withhold nonexempt portions of records in cases involving a large amount of records or high-cost line-by-line review “if the proportion of nonexempt factual material is relatively small and is so interspersed with exempt materials that separation by the agency and policing by the

³⁶ See AT&T Reply at 3 n.6.

³⁷ Application for Review at unnumbered page 5; Lakin Reply at unnumbered page 2. Lakin was provided with 31 redacted pages of records, but specifically did not seek review of the redaction of those records, noting that it could obtain unredacted versions of those records “directly from the carriers.” Application for Review at unnumbered page 5 n.1.

³⁸ Bureau Decision at 9 (referring to the audit materials).

³⁹ A similar result was reached in the Gallegos FOIA Decision, supra n.14.

⁴⁰ Application for Review at unnumbered page 5.

⁴¹ Id.

⁴² See Qwest Communications International, Inc. v. FCC, 229 F.3d 1172, 1181 (D.C. Cir. 2000) (Qwest), quoting Confidentiality Order, 13 FCC Rcd at 24847-49 (noting longstanding policy of treating audit materials confidentially because of, *inter alia*, potential for competitive injury to submitter of the materials); see also 47 C.F.R. § 0.457(d)(1)(iii) (audit materials not routinely available).

⁴³ Qwest, 229 F.2d at 1181 citing Confidentiality Order, 13 FCC Rcd at 24847-48.

⁴⁴ 5 U.S.C. § 552(b).

⁴⁵ E.g., Neufeld v. IRS, 646 F.2d 661, 663 (D.C. Cir. 1981).

courts would impose an inordinate burden.”⁴⁶ As one court recently observed in declining to order the agency to segregate nonexempt information, “the necessary redaction would require the agency to commit significant time and resources to a task that would yield a product with little, if any, informational value.”⁴⁷ The Enforcement Bureau previously withheld these records in response to the Gallegos FOIA request.⁴⁸ In processing that request, the Enforcement Bureau reviewed the records to determine whether any segregable factual materials could be released but decided that “no meaningful non-exempt information could be segregated from the documents.”⁴⁹ The Bureau here could reasonably rely on the work performed by the Enforcement Bureau in processing a substantially similar FOIA request.⁵⁰

Discretionary Release of Records

12. Finally, Lakin urges that even if we conclude that the records are properly withheld under the FOIA, we should release them as a matter of our discretion.⁵¹ We decline to do so. Lakin suggests discretionary release is appropriate because it claims there is “much confusion over the USF, much frustration over how it is implemented, and whether it is legally being implemented.”⁵² Lakin does not explain the basis for its assertions. In any event, the Commission and the Universal Service Administrative Corporation have extensive materials posted on the Internet explaining the USF.⁵³ Lakin has not made a persuasive showing that release of the materials that are properly withheld under FOIA Exemption 4, including the audit materials submitted by AT&T and Sprint, should be released as a matter of our discretion.⁵⁴ In addition, the Exemption 5 materials related to the audits will not be released as a matter of our discretion in light of the sensitive nature of the deliberative process in the audit context.⁵⁵

III. ORDERING PARAGRAPHS

13. IT IS ORDERED that The Lakin Law Firm, P.C.’s application for review is DENIED. Lakin may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(b).

14. The officials responsible for this action are the following Commissioners: Chairman Powell, Commissioners Abernathy, Copps, Martin and Adelstein.

⁴⁶ Johnson v. Executive Off. for United States Attys., 310 F.3d 771, 776-77 (D.C. Cir. 2002); see also Solar Sources, Inc. v. United States, 142 F.3d 1033, 1039 (7th Cir. 1998).

⁴⁷ Assassination Archives & Research Center v. CIA, 177 F. Supp.2d 1, 9 (D.D.C. 2001).

⁴⁸ Gallegos FOIA Decision, supra n.14.

⁴⁹ Id. at 6. We note that in the Gallegos FOIA, a substantial amount of time was spent by the Bureau reviewing the records to determine what portions could be released. Ultimately the requester received 40 pages of records, a result similar to the record release in this FOIA proceeding.

⁵⁰ Indeed, by doing so, the FOIA fees incurred for processing Lakin’s request were less than otherwise would have been charged..

⁵¹ Application for Review at unnumbered page 6.

⁵² Id.

⁵³ See, e.g., <http://www.fcc.gov/wcb/universal_service/welcome.html> (FCC pages on USF including numerous fact sheets); <<http://www.universalservice.org/default.asp>> (USAC website).

⁵⁴ See 47 C.F.R. § 0.457(d) and 0.457(d)(1)(iii) (requiring persuasive showing for release of Exemption 4 materials) and § 0.461(c) (requiring a statement of reasons for release of materials that may be withheld under Exemption 4). See also Qwest, 229 F.3d at 1181.

⁵⁵ See Scott J. Rafferty, 5 FCC Rcd 4138 (1990) (affirming refusal of Bureau to release as a matter of discretion Exemption 5 audit-related data).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary